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A Constitutional Chaos and A Call for Help: The Chiaroscuro Backdrop¹ of *Johnson v. Board of Regents of the University of Georgia*²

“Race is the perpetual American dilemma.”³

INTRODUCTION

The United States Supreme Court uses strict scrutiny to review a claim that a classification violates a plaintiff's rights under the Equal Protection Clause⁴ of the Fourteenth Amendment if the classification is suspect. Under strict scrutiny, the objective sought by the government must be compelling and the means chosen by the government must be narrowly tailored to achieve that compelling objective. In other words, suspect classifications withstand constitutional muster when they are necessary to fulfill a compelling governmental objective.

It was not until 1944 in *Korematsu v. United States*⁵ that race was specifically recognized as a suspect class so as to subject any racial classifications to strict scrutiny. In an opinion by Justice Black, the Court stated that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.”⁶ Therefore, race is a suspect class and any classification based on race must be necessary, or narrowly tailored, to further a compelling governmental objective.

The history of race in the context of education took an important step in 1954 in *Brown v. Board of Education of Topeka*.⁷ In *Brown*, the Court expressed that the idea of “separate but equal” was inherently unequal, and therefore, any law based on the “separate but equal” doctrine violated the Equal Protection Clause of the

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1. The title of this article was taken from the opinion of Judge Selya of the First Circuit Court of Appeals in *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998).

2. 263 F.3d 1234 (11th Cir. 2001).

3. *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 128 (4th Cir. 1999) (citing *J. Harvie Wilkinson III, From Brown to Bakke* 8 (1979)).

4. U.S. Const. amend. XIV, § 1. The Equal Protection Clause states that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

5. 323 U.S. 214, 65 S.Ct. 193 (1944).

6. *Id.* at 216, 65 S.Ct. at 194. The Court also upheld the exclusion order under strict scrutiny review.

7. 347 U.S. 483, 74 S. Ct. 686 (1954).

Fourteenth Amendment.⁸ However, the *Brown* decision did not end the use of racial classifications in education. Claims of racial discrimination continue to plague courts, as the Eleventh Circuit discovered in *Johnson v. Board of Regents of the University of Georgia*.⁹

In August 1999, Plaintiffs Jennifer Johnson, Aimee Bogrow, and Molly Ann Beckenhauer challenged the University of Georgia's ("UGA") freshman admissions policy alleging that it discriminated against them based on race. Specifically, the plaintiffs claimed the policy violated the Equal Protection Clause¹⁰ of the Fourteenth Amendment. The district court found for the plaintiffs and the Eleventh Circuit affirmed. The court held that UGA's admissions policy failed strict scrutiny and violated the Equal Protection Clause of the Fourteenth Amendment.¹¹ However, the *Johnson* court did not decide what it called the "initial question:" Is student-body diversity a compelling governmental interest that satisfies strict scrutiny review in constitutional analyses?¹² Although the end result in *Johnson* is correct, the court's refusal to address the issue of diversity as a compelling interest has only served to add to the chaos that has become affirmative action in the context of higher education.

This article will address three questions: (1) Is the diversity issue an open question, or in other words, is *Bakke* binding?; (2) If diversity has any place in university admissions policies, can race be a factor in diversity plans?; and (3) Should the Eleventh Circuit have resolved the diversity issue in *Johnson*? Part I of this article discusses the source of the problem, the controversial decision of *Regents of the University of California v. Bakke*.¹³ Part II sets out the facts and procedural background of *Johnson* and the Eleventh Circuit's holding. Part III addresses the current circuit split as to the proper interpretation of *Bakke* and further discusses whether diversity is a compelling interest. Part IV examines the current "assumption" trend that some courts are following and the resulting problems of this analysis. Part V examines race as an unacceptable discriminatory tool and further discusses the *Johnson* court's analysis of race as a factor in UGA's admissions decisions. Part VI focuses on the *Johnson* court's treatment of the diversity issue and further discusses whether the court should have made an attempt to resolve it. It will be shown that, although *Johnson* did not affirmatively provide an answer to the

8. *Id.*

9. 263 F.3d 1234 (11th Cir. 2001).

10. U.S. Const. amend. XIV, § 1.

11. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001).

12. *Id.* at 1244.

13. 438 U.S. 265, 98 S. Ct. 2733 (1978).

diversity issue, the Eleventh Circuit followed constitutional tenet in its decision. While this article focuses on the *Johnson* court's analysis, it is meant to have much broader implications. The discussion and analysis shows how future courts are likely to resolve the diversity issue, or more accurately, not to resolve it at all.

I. TO UNDERSTAND THE PROBLEM IS TO UNDERSTAND ITS
FOUNDATION: *REGENTS OF THE UNIVERSITY OF CALIFORNIA V.*
BAKKE

The question of whether diversity is a compelling interest that will satisfy strict scrutiny review is one that arises from the United States Supreme Court case of *Regents of the University of California v. Bakke*.¹⁴ The issue in *Bakke* was whether the Medical School of the University of California at Davis' admissions policy was unconstitutional because it reserved sixteen out of one hundred places for minority applicants.¹⁵ The California Supreme Court held that the university's admissions policy violated the Equal Protection Clause.¹⁶

In a five-to-four ruling, the United States Supreme Court found the policy refusing Bakke's admission into the medical school was invalid; however, it reversed the lower courts' decision enjoining the university from ever considering race as a factor in future admissions decisions.¹⁷ Specifically, Justices Powell, Stevens, Burger, Stewart, and Rehnquist affirmed the finding that the policy was invalid and ordered Bakke admitted. However, a different majority, made up of Justices Powell, Brennan, White, Marshall, and Blackmun, reversed the California Supreme Court's injunction of the university's consideration of race in the policy.¹⁸

Justice Powell supplied the deciding vote for both holdings of the Court. In his opinion, Justice Powell found the university's goal of obtaining diversity in its student body to be a compelling interest.¹⁹ No other Justice joined in this part of Justice Powell's opinion. Justices Stevens, Burger, Stewart, and Rehnquist did not reach this issue and instead found the admissions policy invalid on other grounds.²⁰ Justices Brennan, White, Marshall, and Blackmun, while

14. *Id.*, 98 S. Ct. 2733.

15. *Id.*, 98 S. Ct. at 2733.

16. *Id.* at 271, 98 S. Ct. 2738.

17. *Id.* at 271-72, 98 S.Ct. 2738.

18. *Id.* at 272, 98 S.Ct. at 2738.

19. *Bakke*, 438 U.S. at 314, 98 S. Ct. at 2761.

20. *Id.* at 421, 98 S. Ct. at 2815. These Justices found that the policy violated Title VI of the Civil Rights Act of 1964. It provides in pertinent part: "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

agreeing that some uses of race in university admissions policies are permissible, did not decide whether diversity was a compelling state interest because they did not use the strict scrutiny standard of review.²¹ Specifically, this group of Justices determined that classifications based on race must be substantially related to achieving an important governmental objective.²² Therefore, the only Justice who found student body diversity to be a compelling interest was Justice Powell. This dispute continues today and is evident in *Johnson*.

II. *JOHNSON V. BOARD OF REGENTS OF THE UNIVERSITY OF GEORGIA*

A. *Factual and Procedural Background*

In 1969, the Office of Civil Rights (the "OCR") declared that "past patterns of racial segregation have not been eliminated from most of the institutions within" Georgia's university system.²³ The following year the OCR ordered the Board of Regents to implement affirmative action plans to alleviate this problem.²⁴ These affirmative action programs sought to increase the number of African-Americans enrolled in Georgia's educational institutions.²⁵ Progress was made. In 1989, the OCR found that Georgia's university system "had substantially complied with the prescribed remedial measures."²⁶ Therefore, Georgia's system of public higher education complied with Title VI of the Civil Rights Act of 1964, and no additional desegregation measures were required by the OCR.²⁷

The claim against the University of Georgia's Board of Regents stemmed from the university's 1996 revised freshman class admissions policy. This policy divided the admissions process into three stages.²⁸ The three stages were: (1) the "First Notice" stage, (2) the "Total Student Index" or "TSI" stage, and (3) the "Edge Read" or "ER" stage.²⁹

any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

21. *Id.* at 359, 98 S.Ct. at 2783.

22. *Id.*, 98 S.Ct. at 2783. This is an intermediate level of constitutional review, whereas strict scrutiny review is the highest level of review a court will use to determine if a state action is unconstitutional.

23. *Johnson*, 263 F.3d 1234, 1239-40 (11th Cir. 2001).

24. *Id.* at 1240.

25. *Id.* The court in *Johnson* stated that these institutions were "traditionally white educational institutions." *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

UGA selected the majority of its freshman class in the "First Notice" stage. Under the policy, UGA granted admission automatically to those prospective students whose SAT scores are at least 450 Verbal, 450 Math, and 1000 overall and whose academic indexes (AIs) are 2.86 or above.³⁰ The AI consisted of grade point average and quality of curriculum. The program then divided the remaining applications into two groups. The group of applicants with an AI of at least 2.40 and SAT scores of at least 950 overall, 430 on Verbal, and 400 on Math proceeded to the "TSI" stage.³¹ The University automatically rejected the group of applicants with scores that fall below the minimum AI or SAT requirements.³²

Under the "TSI" stage, the university expressly considered an applicant's race.³³ In addition to the SAT score, GPA, and quality of curriculum, the university considered five "leadership/activity" or "other" factors and three demographic factors in determining whether an applicant would be admitted, rejected, or passed to the final stage.

The five leadership/activity or other factors were: (1) parent or sibling ties to UGA, (2) hours spent on extracurricular activities, (3) hours spent on summer work, (4) hours spent on school-year work, and (5) first-generation college. The three demographic factors were: (1) race/ethnicity, (2) gender, and (3) Georgia residency. The "TSI" stage awarded a non-Caucasian a point credit of 0.5.³⁴ Moreover, the SAT score, which awarded a point credit of 1.0, was the only other factor in the TSI equation that awarded more than the race factor.³⁵ In the "TSI" stage, those applicants with "TSI" scores of 4.93 or higher were automatically admitted and those applicants with "TSI" scores below 4.66 were automatically rejected.³⁶ Applicants whose scores fell between 4.66 and 4.92 passed to the final stage.³⁷

In the "ER" stage, those applicants still in the pool started with a score of zero.³⁸ Consequently, the admissions officers evaluated the remaining applicants "on an individual basis."³⁹ The officers

30. *Johnson*, 263 F.3d at 1241 (11th Cir. 2001).

31. *Id.*

32. *Id.*

33. *Id.* Specifically, this stage combined weighted scores of academic, extracurricular, demographic, and other factors.

34. *Id.*

35. *Id.*

36. *Johnson*, 263 F.3d at 1241 (11th Cir. 2001).

37. *Id.*

38. *Id.* at 1240.

39. *Id.* "Notably, the ER stage is the only stage in the freshman admissions process where an applicant's file is actually read and qualitatively evaluated by admissions officers rather than being processed mechanically based upon the data specifically requested by the application form and inputted by the applicant." *Id.* at 1241.

"look[ed] for qualities that might not have been apparent at the First Notice and TSI stages."⁴⁰ These admissions officers individually read every applicant's file and admitted those prospective students who met the "ER" requirements.⁴¹ More importantly, however, race was not a designated factor at the ER stage.⁴²

The plaintiffs, three Caucasian female applicants, filed suit in federal district court alleging that UGA's 1999 freshman admissions policy⁴³ discriminated against them based on race.⁴⁴ Because the plaintiffs were Caucasian, UGA did not grant them the 0.5 racial credit given to minority applicants. Consequently, their scores fell below the minimum TSI score,⁴⁵ and plaintiffs were denied admission.⁴⁶ During the litigation, President of UGA, Michael Adams, presented a speech "in which he state[d], 'I remain committed to diversity . . . and particularly to increasing the representation of African-Americans within the University of Georgia student body.'"⁴⁷ The district court rejected the university's diversity argument and held that the promotion of student body diversity in higher education was not a compelling interest.⁴⁸ The district court granted summary judgment for the plaintiffs,⁴⁹ and the university appealed to the Eleventh Circuit Court of Appeals.

B. The Eleventh Circuit's Opinion

The Eleventh Circuit divided the analysis into two parts: 1) "whether student body diversity may be a compelling interest"⁵⁰ and 2) "if so, whether UGA has met its burden of showing that its policy is narrowly tailored to serve that interest."⁵¹ The court first recognized

40. *Id.* at 1240.

41. *Johnson*, 263 F.3d at 1240-41 (11th Cir. 2001). Because plaintiffs in this case did not pass the TSI stage, the exact numbers for the ER stage were not provided.

42. *Id.* at 1241.

43. "The framework of the revised [1996] policy is the same as that of the 1999 policy at issue today." *Id.* at 1240.

44. *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000). The plaintiffs claimed the policy violated 42 U.S.C. § 2000d (Title VI), and 20 U.S.C. § 1681 (Title IX).

45. The minimum "TSI" number was 4.66. *Johnson*, 106 F. Supp. 2d at 1366.

46. *Id.*

47. *Id.* at 1371. President Adams continued, "UGA wants to be fair, it wants to be accessible, it wants to be representative of the total population of the state." *Id.*

48. *Id.* at 1375.

49. *Id.* at 1381.

50. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1242 (11th Cir. 2001).

51. *Id.*

“that UGA’s policy was subject to strict constitutional scrutiny.”⁵² Therefore, “UGA’s burden in this case was substantial,” and UGA was required to prove that its freshman admissions policy was narrowly tailored to serve a compelling interest.⁵³

The court began its analysis by determining UGA’s asserted compelling interest. Specifically, the court stated “UGA identifies the educational benefits of student body diversity in higher education as the compelling interest justifying the consideration of race in its freshman admissions decisions.”⁵⁴ The court then asked whether student body diversity is a compelling interest, but concluded, “[it] need not . . . resolve in this opinion whether student body diversity ever may be a compelling interest . . .”⁵⁵ Rather, the court determined that “UGA’s . . . policy is unconstitutional because UGA has plainly failed to show that its policy is narrowly tailored to serve that interest . . . even assuming that UGA’s asserted interest in student body diversity is a compelling interest.”⁵⁶

The court then moved to the second part of its analysis. In determining that UGA’s admissions policy was not narrowly tailored to serve a compelling interest, the court stated that “some aspects of [the diversity] issue are relevant to our narrow tailoring analysis.”⁵⁷ Thus, the Eleventh Circuit discussed that issue⁵⁸ in depth.

The court’s discussion focused on Justice Powell’s separate opinion in *Bakke*.⁵⁹ The Eleventh Circuit in *Johnson* recognized that “Justice Powell [wrote] solely for himself” in his opinion in *Bakke* when he “clearly identified diversity as a compelling interest that may be asserted by a university in defense of an admissions policy . . .”⁶⁰ In addition, the *Johnson* court stated “the fact is inescapable that no five Justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause . . .”⁶¹ Thus,

52. *Id.* at 1243. “Both the Supreme Court and our Court have made clear that racial classifications, whatever the motivation for enacting them, are highly suspect and rarely withstand constitutional scrutiny.” *Id.*

53. *Id.* at 1244.

54. *Id.* The Court noted that “UGA does not identify remediating past discrimination as the compelling interest justifying its policy.” *Id.*

55. *Id.*

56. *Johnson*, 263 F.3d at 1244-45.

57. *Id.* at 1245.

58. The issue was whether diversity is a recognized compelling interest that satisfies strict scrutiny. Specifically, the Court stated, “we would be remiss if we did not address the issue at all.” *Id.*

59. 438 U.S. 265, 98 S.Ct. 2733 (1978).

60. *Johnson*, 263 F.3d at 1246.

61. *Id.* at 1248. For example, the Court noted Justice Brennan’s opinion “did not consider whether student body diversity constitute[s] a compelling interest sufficient to justify the university’s discriminatory admissions policy.” *Id.* at 1246.

it "is an open question, and . . . one that . . . warrants consideration by the Supreme Court."⁶² In spite of this, the Eleventh Circuit elected to follow other "courts [who] have simply assumed that student body diversity is a compelling interest, and then proceeded to explain why the policy being challenged is unlawful regardless."⁶³ Therefore, the court *assumed*, for purposes of this case only, that diversity is a compelling interest so it could determine the constitutionality of UGA's policy, using the narrowly tailored analysis.⁶⁴

In its narrowly tailored analysis, the court followed *Tuttle v. Arlington County School Board*,⁶⁵ a Fourth Circuit decision. *Tuttle* adopted factors from *United States v. Paradise*,⁶⁶ a Supreme Court decision in an employment affirmative action case. In *Tuttle*, the Court "evaluat[ed] whether a local school district's race-conscious admissions policy was narrowly tailored."⁶⁷ The *Paradise* factors considered in *Tuttle* to determine whether the policy was narrowly tailored were: "(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the population or work force, (4) the flexibility of the policy including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on third parties."⁶⁸ The Eleventh Circuit considered the *Paradise* factors as "general guidance" but tailored them slightly to fit the *Johnson* case.⁶⁹ The court stated that in

evaluating a[n] admissions program designed to serve a compelling interest in obtaining the educational benefits associated with a diverse student body, [one] should examine: (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of

Reference is also made to Justice Stevens's opinion in which he also did not decide the diversity issue. *Id.* at 1247.

62. *Id.* at 1245.

63. *Id.* at 1251 (citing *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); and *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998)).

64. *Johnson*, 263 F.3d at 1251. The court stated, "The Supreme Court has placed as much importance on the requirement that any race-conscious program be narrowly tailored as it has on the requirement that the asserted justification for race-conscious decision-making be sufficiently compelling." *Id.*

65. 195 F.3d 698 (4th Cir. 1999).

66. 480 U.S. 149, 107 S.Ct. 1053 (1987).

67. *Johnson*, 263 F.3d at 1252.

68. *Id.* (citing *Tuttle*, 195 F.3d at 706, citing *Paradise*, U.S. at 171, 107 S. Ct. at 1066) (internal quotation marks omitted).

69. *Id.*

race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.⁷⁰

The court then discussed each factor with respect to UGA's policy and found that the policy was not narrowly tailored under these factors.⁷¹ Specifically, the court found that UGA's policy was inflexible because it mechanically awarded a bonus to all non-Caucasian applicants, a bonus the court said was wholly arbitrary.⁷² The court also found that UGA did not consider race-neutral alternatives that could contribute to diversity.⁷³

The court concluded its analysis of UGA's admissions policy by affirming the district court's summary judgment in favor of the Plaintiffs. However, it is important to note that the court reached this conclusion "not because student body diversity can never be a compelling interest . . . but rather because the policy is not narrowly tailored to serve that interest."⁷⁴

III. THE CIRCUIT SPLIT ON THE INTERPRETATION OF *BAKKE*

A. *The Fifth Circuit*

The Fifth Circuit's holding in *Hopwood v. State of Texas*⁷⁵ is presently the only case to hold that student body diversity is not a compelling interest. This case addressed non-minority applicants' claims that the University of Texas Law School's admissions policy violated the Equal Protection Clause.

After briefly summarizing the separate opinions in *Bakke*, the Fifth Circuit concluded that "none of the four other justices would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admissions criterion."⁷⁶ Specifically, the Fifth Circuit followed the *Hopwood II*⁷⁷ decision in the case's second appeal, and stated that "once the *Hopwood II* panel determined to decide the case on the question of compelling state

70. *Id.* at 1253.

71. *Id.* at 1254.

72. *Id.* at 1254, 1257.

73. *Johnson*, 263 F.3d at 1255.

74. *Id.* at 1264.

75. 236 F.3d 256 (5th Cir. 2000). This case represents the third appeal.

76. *Id.* at 275.

77. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). This case represents the second appeal which affirmed the district court's judgment on the merits.

interest and not . . . on the question of narrow tailoring, the panel was constrained in its judgment only by other Supreme Court decisions and by the text of the Constitution itself.”⁷⁸ Therefore, the Fifth Circuit interpreted Justice Powell’s opinion in *Bakke* as not binding.⁷⁹ Consequently, the court did not need to address whether the policy was narrowly tailored to serve any compelling interest because the University of Texas’s interest was not compelling. The United States Supreme Court denied a writ of certiorari.⁸⁰

B. *The Ninth Circuit*

The Ninth Circuit’s decision in *Smith v. University of Washington Law School*⁸¹ contradicts *Hopwood*. The *Smith* court specifically ruled that “educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.”⁸² Like *Hopwood*, this case addressed applicants’ claims against the University of Washington Law School alleging that the law school’s admissions policy discriminated based on race and violated the Equal Protection Clause.

The Ninth Circuit found Justice Powell’s opinion in *Bakke* was binding precedent.⁸³ Specifically, the court determined that Justice Powell’s analysis was the narrowest ground upon which a race-conscious decision-making process could stand.⁸⁴ The court based its decision on the rule in *Marks v. United States* that states “when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁸⁵ Since the *Smith* court found Justice Powell’s opinion in *Bakke* to be the narrowest ground on which a judgment could stand, the court viewed his opinion as binding precedent.

78. *Hopwood*, 236 F.3d at 275.

79. *Id.* Indeed, “some may think it was imprudent for the [court] to venture into uncharted waters by declaring the diversity rationale invalid, but the panel’s holding clearly does not conflict directly with controlling Supreme Court precedent.” *Id.* The Fifth Circuit also explicitly rejected the Ninth Circuit’s holding in *Smith v. Univ. of Wash.*, 233 F.3d 1188 (9th Cir. 2000), that Justice Powell’s diversity rationale is binding Supreme Court precedent. *Id.*

80. *Texas v. Hopwood*, 533 U.S. 929, 121 S.Ct.2550 (2001).

81. 233 F.3d 1188 (9th Cir. 2000).

82. *Id.* at 1201.

83. *Id.* The court noted “at our level of the judicial system Justice Powell’s opinion remains the law.” *Id.*

84. *Id.* at 1200.

85. *Id.* at 1199 (citing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990 (1977)) (internal quotation marks omitted).

The *Smith* court noted that even though “the [Supreme] Court has not looked upon race-based factors with much favor,” it “has [also] not returned to the area of university admissions.”⁸⁶ Therefore, the Ninth Circuit adopted Justice Powell’s opinion in *Bakke* and identified diversity as a compelling governmental interest. The court concluded by suggesting that a properly designed and operated race-conscious admissions program would not be in violation of the Fourteenth Amendment.⁸⁷ As in *Hopwood*, the United States Supreme Court denied a writ of certiorari in *Smith*.⁸⁸

C. *The Open Question: Is Diversity a Compelling Interest?*

The question has puzzled scholars, lawyers, and judges. Each has searched for an answer in judicial opinions, law review articles, and books. Perhaps only one entity can provide the answer—the United States Supreme Court. After all, the problem stems from one of its own—*Regents of the University of California v. Bakke*.⁸⁹ Unfortunately, the Supreme Court has refused to answer what undoubtedly may be considered one of the most troubling constitutional questions of interpretation since the *Bakke* decision.

1. *Support for the Proposition that Diversity is Not a Compelling Interest*

Much support exists for the idea that diversity is not compelling. As discussed, the *Hopwood* court crossed the boundaries when it pronounced its decision in 2000.⁹⁰ Further, this position is reinforced by many courts and scholars in America who agree with the notion that Justice Powell’s separate opinion in *Bakke* is not binding Supreme Court precedent.

*Grutter v. Bollinger*⁹¹ addressed the constitutionality of the University of Michigan Law School’s admissions policy. Plaintiff, a rejected applicant, alleged that the law school used race as its predominant factor in its admissions policy.⁹² Plaintiff ultimately asserted that the law school discriminated against her on the basis of

86. *Id.* at 1200.

87. *Id.* at 1201.

88. 532 U.S. 1051, 121 S.Ct. 2192 (2001).

89. 438 U.S. 256, 98 S.Ct. 2733 (1978). The *Johnson* Court stated “[i]n over 150 pages of the U.S. Reports, the Justices [in *Bakke*] have told us mainly that they have agreed to disagree.” *Johnson*, 263 F.3d 1234, 1248 (11th Cir. 2001) (citing *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980)).

90. See text accompanying *supra* note 79.

91. 137 F. Supp. 2d 821 (E.D. Mich. 2001).

92. *Id.*

race.⁹³ The *Grutter* court attacked the diversity issue on the very ground on which the Ninth Circuit in *Smith* relies. It held the *Marks* analysis inapplicable to *Bakke*. Specifically, it determined that "the *Marks* framework cannot be applied to a case like *Bakke*, where the various Justices' reasons for concurring in the judgment . . . are so fundamentally different as to not be comparable in terms of 'narrowness.'"⁹⁴ The *Grutter* court emphasized that the separate opinions in *Bakke* were completely different rationales.⁹⁵ Therefore, the framework articulated in *Marks* "is inapplicable because the varying positions [of the Justices] cannot be compared for 'narrowness.'"⁹⁶ Consequently, the *Smith* argument that Justice Powell's opinion is binding precedent is weakened by this rejection of the *Marks* analysis' applicability to *Bakke*. As a result of this analysis, the *Grutter* court concluded that "*Bakke* does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest."⁹⁷

Although they are not higher education cases, the post-*Bakke* decisions of the Supreme Court also reinforce the proposition that diversity is not compelling.⁹⁸ Indeed, these cases suggest the only remaining compelling state interest is to remedy the present effects of past discrimination.⁹⁹ The most important post-*Bakke* case is *City of Richmond v. J. A. Croson Co.*¹⁰⁰ In *Croson*, the United States Supreme Court, in an opinion by Justice O'Connor, stated that "unless [classifications based on race] are strictly reserved for

93. *Id.*

94. *Id.* at 847.

95. *Id.*

96. *Id.* The "narrowest grounds" analysis suggests a case where varying opinions, while all concurring in the judgment, "can be placed on a continuum from narrow to broad" thus, suggesting an overlap between the different rationales. *Grutter*, 137 F. Supp. 2d at 847.

97. *Id.* at 848.

98. In *Grutter*, the court refers to *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989) as the two post-*Bakke* cases of the Supreme Court that support this idea. It states, "*Adarand* and *Croson* clearly indicate that racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination." *Grutter*, 137 F. Supp. 2d at 848-49.

99. B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 Minn. L. Rev. 1391, 1410 (2001). See also William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Calif. L. Rev. 1055, 1120-21 (2001) ("Supporters of affirmative action would be wise to cover their bases by supplementing their defense of the diversity rationale with proof of prior discrimination . . .").

100. 488 U.S. 469, 109 S.Ct. 706 (1989).

remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹⁰¹ Thus, *Croson* may be interpreted to stand for the proposition that "the interest in a diverse student body may be unacceptable to courts."¹⁰²

The United States Supreme Court has had two opportunities to do away with the idea that diversity is not a compelling state interest. The Court refused to grant certiorari in *Texas v. Hopwood*.¹⁰³ Although a refusal to grant certiorari does not suggest any opinion of the Supreme Court, this refusal to review *Hopwood* "has left many analysts wondering about the future of *Bakke*."¹⁰⁴ Additionally, the Fifth Circuit in *Lesage v. State of Texas*¹⁰⁵ rejected student body diversity as a compelling governmental interest in determining whether the University of Texas's admissions policy for its doctoral program in counseling psychology discriminated against applicants based on race.¹⁰⁶ Ultimately, the Supreme Court reversed the Fifth Circuit's decision in *Texas v. Lesage*.¹⁰⁷ However, the reversal was based on standing, not on the question of diversity. The Court seemingly suggests that it will not disturb the Fifth Circuit's holding that student body diversity is not a compelling interest.

Hopwood has many supporters. Indeed, caselaw indicates that diversity does not constitute a compelling governmental interest.¹⁰⁸ The post-*Bakke* decisions of the Supreme Court suggest diversity is not a compelling interest as well. Therefore, it is arguable that "the diversity rationale for affirmative action may soon be rejected or curtailed by the Supreme Court."¹⁰⁹

101. *Id.* at 493-94, 109 S.Ct. at 722.

102. Bednark, *supra* note 99, at 1410.

103. 533 U.S. 929, 121 S.Ct. 2550 (2001).

104. Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 Yale L. & Pol. Rev. 341, 371 (2001).

105. 158 F.3d 213 (5th Cir. 1998), *rev'd on other grounds by Texas v. Lesage*, 528 U.S. 18, 120 S.Ct. 467 (1999).

106. *Id.* The Fifth Circuit stated, "'Diversity,' the justification given for the University's use of racial preferences, is not a compelling state interest that satisfies the strict scrutiny standard for the purpose of admissions at a public university." *Lesage*, 158 F.3d at 221.

107. 528 U.S. 18, 120 S.Ct. 467 (1999).

108. Other cases supporting this proposition include *Lutheran Church-Missouri Synod v. Fed. Communications Comm'n*, 141 F.3d 344, 354 (D.C. Cir. 1998) ("We do not think diversity can be elevated to the 'compelling' level . . ."); *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (court did not endorse diversity as a compelling interest in the employment context pursuant to Title VII); and *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) ("No inference may here be taken that we are of opinion that racial diversity is a compelling governmental interest.").

109. William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic*

2. *Support for the Proposition that Diversity is a Compelling Interest*

Support also exists for the idea that diversity is a compelling interest. The Ninth Circuit's decision in *Smith* is perhaps the biggest contribution to this belief. This position is further supported by other courts and scholars who conclude that Justice Powell's opinion in *Bakke* is binding Supreme Court precedent.

The problem of race in university admissions decisions extends back to the 1950 case of *Sweatt v. Painter*.¹¹⁰ In *Sweatt*, the Supreme Court found that the Equal Protection Clause of the Fourteenth Amendment required the University of Texas Law School to admit Sweatt, an applicant who sought a writ of mandamus to compel his admission into the law school.¹¹¹ Sweatt sought admission to the University of Texas Law School because the law school for African Americans at that time was not substantially equal to the state law school for Caucasians.¹¹² Specifically, the Plaintiff claimed that the educational opportunities afforded Caucasian law students were not equal to those afforded African American law students. Thus, the University of Texas Law School's decision not to admit Sweatt violated the Equal Protection Clause. In its opinion, the Court did not consider whether diversity may be a compelling state interest because the standard was not developed at the time the case was decided. However, dicta suggests that diversity is an integral part of any student body. It noted that the legal profession is a practical one that cannot be effective if isolated from the environment in which it practices.¹¹³ The Court found that the law school for African Americans excluded from its student body members of the racial groups that make up eighty five percent of the Texas population.¹¹⁴ The Court called this environment an "academic vacuum," one in which no student or practicing lawyer would choose to learn.¹¹⁵ The Court recognized that this environment was "removed from the interplay of ideas and the exchange of views with which the law is concerned."¹¹⁶ Because an applicant inevitably deals with a diverse population in practice, the Court arguably suggests that only a diverse student body will wholly prepare a student for practice after law

Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students, 89 Calif. L. Rev. 1055, 1120 (2001).

110. *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848 (1950).

111. *Id.*, 70 S. Ct. at 848.

112. *Id.*, 70 S. Ct. at 848.

113. *Id.* at 634, 70 S. Ct. at 850.

114. *Id.*, 70 S. Ct. at 850.

115. *Id.*, 70 S. Ct. at 850.

116. *Sweatt*, 339 U.S. at 634, 70 S. Ct. at 850.

school. The Court in *Sweatt* furthered the proposition that diversity is necessary for effective lawyering and, consequently, may raise diversity to the compelling level.

The district court in *Gratz v. Bollinger*¹¹⁷ held that student body diversity was a compelling governmental interest that satisfied strict scrutiny review. One of the issues in *Gratz* was whether the University of Michigan's practice of reserving seats for minority applicants in the College of Literature, Science, and the Arts from 1995 to 1998 violated the Equal Protection Clause. The court found that the university used a "protected seats" system.¹¹⁸ Under this system, a specific number of seats were set aside for "under-represented minority candidates."¹¹⁹ As a result, these minority applicants were insulated from competition from non-minority applicants. The court found this policy to be the functional equivalent of a quota system which violated the Fourteenth Amendment.¹²⁰

In its opinion the *Gratz* court fully discussed the diversity issue and concluded diversity was compelling. In support of this contention, the court cited several studies that have found a diverse student body to yield tremendous educational benefits. These findings showed that "students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting."¹²¹ The court also recognized that diversity serves to break patterns of racial segregation historically rooted in our society.¹²² By indicating that student body diversity enhances the quality of education, these findings supported the possibility that diversity may be compelling.

The *Gratz* court also distinguished diversity in the higher education context from the remedial setting. As discussed, opponents of labeling diversity a compelling interest argue the only compelling interest is remedying the present effects of past discrimination.¹²³ This position comes from Justice O'Connor's opinion in *Croson* where the issue specifically dealt with remedying the effects of past discrimination, that is, a remedial setting, not diversity. The *Gratz* court weakened the argument that remedying the effects of past discrimination is the only compelling interest. The *Gratz* court

117. 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000).

118. *Id.* at 831.

119. *Id.* The policy also reserved seats for in-state students and certain other groups such as athletes, foreign applicants, and ROTC candidates.

120. *Id.* at 832. However, the court went on to uphold the university's current admissions policy.

121. *Id.* at 822.

122. *Id.*

123. See text accompanying *supra* notes 98 and 99.

identified diversity in higher education as a "permanent and ongoing interest" and remedying the effects of past discrimination as a temporary interest.¹²⁴ Specifically, the court stated, "unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually."¹²⁵ Additionally, diversity is a non-remedial purpose. Since the *Croson* court did not consider whether a non-remedial purpose could ever constitute a compelling interest, its holding may be limited to remedial settings.¹²⁶ Therefore, diversity may be compelling because of its permanency in the higher education context.

3. *The Open Question*

Support exists on both sides of the argument. *Hopwood* stands for the proposition that diversity is not a compelling interest, while *Smith* holds diversity is a compelling interest. The respective circuits have their followers. *Grutter* follows the Fifth Circuit's *Hopwood* decision, while *Gratz* follows the Ninth Circuit's *Smith* decision.

The rationales behind the two arguments have also been attacked. The court in *Grutter* found the *Marks* analysis, on which *Smith* relies, inapplicable to the separate opinions in *Bakke*. Thus, the *Smith* decision that diversity is compelling is questionable. However, *Hopwood's* holding that diversity is not compelling is also debatable. The rationale behind the notion that diversity is not compelling was questioned in *Gratz* when it distinguished the diversity context from a remedial setting. Thus, the idea that remedying the effects of past discrimination remains the only compelling interest may be unpersuasive to courts and proponents of the educational and societal benefits of diversity. In short, the question whether diversity is a compelling interest is an open question. However, one cannot ignore that no five Justices in the *Bakke* decision agreed as to whether diversity constitutes a compelling interest. Importantly, no other Justice expressly agreed with Justice Powell when he pronounced diversity a compelling interest. Therefore, the issue will remain debatable until the Supreme Court decides to put an end to the constitutional chaos surrounding the correct interpretation of *Bakke*.

124. *Gratz*, 122 F. Supp. 2d at 823-24.

125. *Id.* at 824.

126. See generally Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 720 (2001). See also *Brewer v. W. Irondequoit Central Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000).

IV. THE "ASSUMPTION DODGE" AND THE PROBLEMS THAT RESULT

A. *The "Assumers"*1. *The Fourth Circuit*

The Fourth Circuit has had opportunities to answer whether diversity is a compelling interest. The issue in *Tuttle v. Arlington County School Board*¹²⁷ was whether the school board's admissions policy for the Arlington Traditional School violated the Equal Protection Clause of the Fourteenth Amendment. The school at issue was "an alternative kindergarten" where "admission is not based upon merit but rather solely upon availability."¹²⁸ However, because "the applicant pool was larger than the number of available positions," the school based admission on a lottery.¹²⁹ Under this lottery system, "applicants from under-represented groups . . . had an increased probability of selection."¹³⁰ As a result, Plaintiffs brought suit claiming "the weighted lottery" violated their Equal Protection rights.

The Fourth Circuit faced the question of whether the school could constitutionally implement a lottery system, in which a higher probability of selection attached to under-represented groups, "to promote racial and ethnic diversity in its student body."¹³¹ There is no question that the school's goal was "not to remedy past discrimination, but rather to promote . . . diversity."¹³² The court recognized the district court held "that as a matter of law, diversity is not a compelling interest because the only compelling governmental interest to justify racial classifications is remedying the effects of past discrimination."¹³³ However, the Fourth Circuit rejected this conclusion by the district court and assumed, without so holding, that diversity may be a compelling governmental interest.¹³⁴ Consequently, the court determined the constitutionality of the admissions policy through the narrowly tailored analysis. Like *Johnson*, the Fourth Circuit left "the question of whether diversity is a compelling interest unanswered."¹³⁵

127. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999).

128. *Id.* at 701.

129. *Id.*

130. *Id.* at 702.

131. *Id.* at 700.

132. *Id.* The February 1998 policy had two goals: "(1) to prepare and educate students to live in a diverse, global society by reflecting the diversity of the community and (2) to help the School Board serve the diverse groups of students in the district" *Tuttle*, 195 F.3d at 701.

133. *Id.* at 703.

134. *Id.* at 705.

135. *Id.*

In another Fourth Circuit case, *Eisenberg v. Montgomery County Public Schools*,¹³⁶ the court considered whether the Montgomery County Board of Education's transfer policy violated Equal Protection. The Plaintiff, a Caucasian transfer applicant, was denied admission to a magnet school by the school board based on the policy's diversity profile. Specifically, "according to the Transfer Booklet, 'transfers that negatively affect diversity are usually denied.'"¹³⁷ As a result, the Plaintiff's parents brought suit on behalf of the denied applicant.

Like the district court in *Tuttle*, the district court in *Eisenberg* answered the diversity issue. It concluded that Montgomery County's asserted interest in the diversity of its student body was a sufficiently compelling governmental interest to justify the transfer policy's race based classifications under strict scrutiny review.¹³⁸ However, the Fourth Circuit followed *Tuttle* and chose not to answer the diversity issue.¹³⁹ It again assumed, without holding, that diversity may be a compelling interest for purposes of this case only. Furthermore, the court resolved the case by examining whether the transfer policy was narrowly tailored to achieve diversity, the purported compelling interest.¹⁴⁰ The Fourth Circuit was clear in its decision to leave the question of whether diversity is a compelling interest for another court. By rejecting the determination of their respective district courts, the Fourth Circuit fuels the confusion that exists among the circuits today, the correct interpretation of *Bakke*.

2. The First Circuit

In *Wessmann v. Gittens*,¹⁴¹ the admissions policy in question allegedly discriminated against applicants based on race. The Plaintiff's father challenged the constitutionality of Boston Latin School's policy alleging that it violated his daughter's equal protection rights.¹⁴² The school's policy "makes race a determining factor in the admission of a subset of each year's incoming classes . . ."¹⁴³ The school automatically grants half of its available seats of admission to

136. *Eisenberg*, 197 F.3d 123 (4th Cir. 1999).

137. *Id.* at 126. "[T]he transfer policy considers race as the sole determining factor, absent a 'unique present hardship,' if the assigned school and the requested school are both stable and their utilization/enrollment factor are acceptable for transfers." *Id.* at 129.

138. *Id.* at 128.

139. *Id.* at 130. "[I]n this case, we also choose to leave it unresolved." *Id.*

140. *Eisenberg*, 197 F.3d at 130.

141. 160 F.3d 790 (1st Cir. 1998).

142. *Id.* at 791-92.

143. *Id.* at 792.

those applicants who score above a composite score on a standardized test.¹⁴⁴ However, the other half of the available seats are allocated on the basis of racial or ethnic guidelines which are determined by the school.¹⁴⁵ As a result, the Plaintiff was not admitted to Boston Latin School.

The district court took a definitive stand on the diversity issue. It held that the School Committee's interest in promoting a diverse student body was compelling.¹⁴⁶ On appeal, the First Circuit recognized the need for clarity concerning this issue.¹⁴⁷ However, it refused the direction of the district court and left the question unanswered. The court stated "we need not definitively resolve this conundrum today" and "instead, . . . assume *arguendo*—but we do not decide—that . . . some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions."¹⁴⁸ The words used by the court suggest that it sees little, if nothing, left of the diversity argument. Its analysis of this "conundrum," while attempting to express the need for a resolution by the Supreme Court, adds more confusion to this "chiaroscuro backdrop."¹⁴⁹

Although the *Wessmann* court assumed for its purposes that diversity was compelling, its dicta suggested otherwise. The court noted that the word "diversity" is an abstract concept and declared that "an inquiring court cannot content itself with abstractions."¹⁵⁰ Further, "it would be cause for consternation were a court, without more, free to accept a term as malleable as 'diversity' in satisfaction of the compelling interest needed to justify governmentally-sponsored racial distinctions."¹⁵¹ Nevertheless, the court chose to follow, "albeit with considerable skepticism," the decisions of *Tuttle* and *Eisenberg*.¹⁵² The First Circuit in *Wessmann*, however, is closer than other courts to holding that diversity is not a compelling state interest.

144. *Id.* at 793.

145. *Id.* These guidelines are set by determining the relative proportions of minorities in the remaining half of the applicants. The seats are then filled, "but the number of students taken from each racial [minority] must match the proportion of that minority in the remaining half of the applicants." *Id.* at 793.

146. *Wessmann*, 160 F.3d at 794.

147. *Id.* at 795. "The question of precisely what interests . . . justify race-based classifications is largely unsettled." *Id.*

148. *Id.* at 796.

149. *Id.* "Chiaroscuro" is defined as "pictorial representation in terms of light and shade without regard for or use of colors in the objects depicted; the quality of being veiled or partly in shadow." Webster's Third New International Dictionary Unabridged 386 (Philip Babcock Gove, Ph.D. ed., 1986).

150. *Id.* at 796-97.

151. *Id.* at 796.

152. *Id.* at 799.

3. The Eleventh Circuit—A Preview to Johnson

*Wooden v. Board of Regents of the University System of Georgia*¹⁵³ is the predecessor of *Johnson*. The Eleventh Circuit in *Wooden* considered whether the University of Georgia's admissions policy violated the Equal Protection Clause based on claims of racial discrimination.¹⁵⁴ Plaintiff alleged UGA gave non-Caucasians preferential treatment in its admissions decisions.¹⁵⁵ The district court in this case, however, did not decide the diversity issue. Rather, like the Fourth and First Circuits, it too determined the constitutionality of UGA's policy under the narrowly tailored analysis.¹⁵⁶

Like the court in *Wessmann*, the district court did suggest that diversity is likely not compelling. The court "is not convinced that these benefits—furthered here only in an abstract sense—justify outright discriminatory admission practices."¹⁵⁷ These discriminatory practices, the court explained, cause "concrete constitutional injuries."¹⁵⁸ Specifically, the court recognized that the Plaintiff was prevented from competing on an equal footing with other applicants because of his race.¹⁵⁹ The district court in *Wooden* also noted that Justice Powell's opinion in *Bakke* is questionable with regard to any precedential value.¹⁶⁰

The Eleventh Circuit overruled the district court, although on different grounds.¹⁶¹ Like the district court, the Eleventh Circuit's analysis did not address whether diversity was a compelling interest. Therefore, the district court's refusal to answer the diversity question remained untouched. With this decision, the Eleventh Circuit set the stage for its decision in *Johnson*.

B. The Assumers' Aftermath: What is the Correct Standard for Courts and Universities?

"What is one to make of that fragmented decision of the Supreme Court?"¹⁶² The confusion as to the proper interpretation of *Bakke* has left courts and universities troubled. Specifically, "[courts] are left

153. 247 F.3d 1262 (11th Cir. 2001).

154. *Id.*

155. See generally *supra* Part II(A), discussing UGA's freshman admissions policy.

156. *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 32 F. Supp. 2d 1370, 1382 (S.D. Ga. 1999). However, the case was ultimately decided on standing grounds in *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001).

157. *Wooden*, 32 F. Supp. 2d at 1380.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Wooden*, 247 F.3d at 1289. The Eleventh Circuit vacated the district court's decision in part on the issue of standing.

162. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1199 (9th Cir. 2000).

with the task of deciding just what the Supreme Court decided [in *Bakke*].”¹⁶³ Further, universities are left with the unpredictable task of producing constitutional race-based admissions policies. As a result of the “assumers’” decisions not to provide an answer to the diversity issue, “both the vitality and meaning of the *Bakke* decision continue to be actively litigated with the future of race-conscious admissions programs hanging in the balance.”¹⁶⁴

Courts need constitutional guidelines. In an area that affects so many people with different beliefs, this is especially important. Presently, “the current legal landscape for affirmative action is bleak.”¹⁶⁵ Contradictory opinions have left the issues unsettled.¹⁶⁶ As a result, courts are confused as to “whether . . . [analyses of *Bakke* and other pertinent judicial decisions] have . . . left the *Bakke* rulings dangling in limbo.”¹⁶⁷ This confusion is reinforced by the decisions in *Tuttle*, *Eisenberg*, *Wessmann*, and *Wooden*. By deciding their constitutional issues through the narrowly tailored analysis, these “assumers” allow room for more conflicting interpretations by future courts faced with the issue. The need for guidance is evident. To bring coherence to this troublesome constitutional arena, the issue of diversity needs to be resolved. Universities and law schools also need constitutional guidelines. Because of the continuing litigation of race-based admissions policies, “a substantial number of America’s leading public universities and their affiliated law schools have terminated race-sensitive affirmative action [plans].”¹⁶⁸ *Hopwood*, *Smith*, *Grutter*, and the other district courts—who have affirmatively provided guidance on the diversity issue—recognize too that a university or law school must be guided by a constitutional standard to apply to its own circumstances. Indeed, “at the heart of these cases is an effort to adduce . . . the permissible methods for universities to structure admissions programs so as to achieve diversity.”¹⁶⁹ *Tuttle*, *Eisenberg*, *Wessmann*, and *Wooden* give no such effort except through their narrowly tailored analyses. As a result, promulgators of admissions policies must search for ways to keep their interests within the law while wondering if their work will be for nothing.

Courts and universities need guidance in the area of affirmative action. In many cases, this guidance is not being provided. What are future courts to do? Surely, they too may soon find themselves

163. *Id.* at 1198.

164. Epstein & Knight, *supra* note 104, at 344.

165. Rosenblum, *supra* note 126, at 709.

166. *Id.* at 722.

167. *Id.* at 710.

168. Kidder, *supra* note 109, at 1060-61.

169. Epstein & Knight, *supra* note 104, at 345.

muddling through this constitutional chaos. And universities? Indeed, most universities and law schools are presently feeling the effect of this debate. Moreover, while struggling to come up with a guiding standard, most courts and universities are braving "the chilling effect of threatened litigation."¹⁷⁰

IV. RACE: THE AMERICAN DILEMMA

A. Race Should be Condemned as the Sole Factor in University Diversity Programs

The question remains whether diversity constitutes a compelling interest. Indeed, it is unquestionable that the benefits of diversity in the educational setting are great. Diverse student bodies serve to make students more aware of the extremely diverse society in which they will live and work. But may race be used as a factor in university diversity policies? The idea that any classification based on race is inherently suspect and probably violative of the Fourteenth Amendment implies race should not be used to diversify a student body. Indeed, the purpose of the Equal Protection Clause is to not deny *anyone* the equal protection of the laws. However, the Court in *Bakke* expressly permits race to be one factor in university admissions decisions as long as it is not the only factor.¹⁷¹

The post-*Bakke* Supreme Court decision of *City of Richmond v. J. A. Croson Co.*¹⁷² reinforces the idea that race should not be the predominant factor in university admissions decisions. In effect, it undermines the *Bakke* decision by limiting the use of race-based classifications in affirmative action plans to those that are designed to remedy past discrimination. Absent a showing of an attempt to remedy the effects of past discrimination by the university, race should not be a factor at all. In *Croson*, the City of Richmond adopted a program where city contractors were required to subcontract at least thirty percent of each contract to minority-owned business enterprises.¹⁷³ The City defined those minorities as "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."¹⁷⁴ The plan prevented majority-owned businesses, such as the J. A. Croson Co., from effectively competing with minority business enterprises

170. Kidder, *supra* note 109, at 1060.

171. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). The opinion by Justices Brennan, White, Marshall, and Blackmun, joined by Justice Powell, support this contention.

172. 488 U.S. 469, 109 S.Ct. 706 (1989).

173. *Id.*, 109 S.Ct. 706.

174. *Id.* at 478, 109 S.Ct. at 713.

for that thirty percent of work from every city contract. The Supreme Court found this program unconstitutional.¹⁷⁵

The Court focused its holding on the lack of evidence demonstrating that the City had ever racially discriminated against minority-owned businesses. The Court indicated that if the City had particularly identified specific acts of past discrimination, it could act to remedy the discrimination.¹⁷⁶ However, no past discriminatory acts by the City were proven. The Court expressed its agreement with Justice Powell's view in *Bakke* when he stated, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."¹⁷⁷ The City effectively treated majority-owned businesses differently in its attempt to guarantee equal protection to those minority-owned businesses. Therefore, the City's use of racial classifications in letting out its contracts violated the majority-owned businesses' rights under the Equal Protection Clause.¹⁷⁸ The Court's decision in *Croson* supports the idea that race should not be used in university diversity policies. Unless the university specifically shows the need to remedy the present effects of past discrimination, the effect of classifying applicants based on race to achieve diversity is to deny some groups equal protection.

The Fourteenth Amendment is the cornerstone of American liberty and equality. Within this amendment, the Equal Protection Clause guarantees to every person the equal protection of the laws.¹⁷⁹ Racial distinctions in any context, by their very nature, tear at this constitutional guarantee. This is especially true in the context of higher education. If the Equal Protection Clause treats every person of every race equally, it follows that allowing race to be a factor in admissions decisions denies to "unprotected" groups the opportunity to compete equally with those protected groups for admissions seats. When a university attempts to guarantee equal protection to minority applicants by allowing race as a factor in its admissions decisions, it is effectively denying equal protection to those non-minority applicants. The Supreme Court has "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race."¹⁸⁰ Allowing race to be a factor in admissions

175. *Id.*, 109 S.Ct. 706.

176. *Id.*, 109 S.Ct. 706.

177. *Id.* at 494, 109 S.Ct. at 722 (citing *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 289-90, 98 S.Ct. 2733, 2748 (1978)).

178. *Id.*, 109 S.Ct. 706.

179. See text accompanying *supra* note 4.

180. *Loving v. Virginia*, 388 U.S. 1, 11-12, 87 S.Ct. 1817, 1823 (1967). However, see generally *Hunt v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452 (2001), in which the Supreme Court permitted some use of race in establishing legislative

policies based on diversity is one such measure which "violates the central meaning of the Equal Protection Clause."¹⁸¹ However, race may be a factor, although not the sole factor, in university diversity plans upon a showing of the need to remedy the present effects of past discrimination. Since diversity has never been held to the level of compelling, the only way for an admissions policy, in which race is a factor, to survive strict scrutiny is if the university shows a present need to remedy past discrimination. Thus, the university is left with a high burden. Not only does the university have to prove that some past action discriminated against a certain race and this past action is presently effecting its applicants, the university also must show its admissions policy can pass the strict scrutiny test. That is, a university must show that its admissions policy is necessary to remedy the effects of some proven past discrimination.

The Supreme Court has supported classifications based on race when the classification is to remedy the effects of past discrimination in *Croson* and *Bakke*. Specifically, Justice O'Connor's opinion in *Croson* supports this proposition. Justice O'Connor suggested that classifications based on race should be strictly reserved for remedial settings only.¹⁸² Furthermore, if racial classifications are used outside of remedial settings, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹⁸³

In an opinion by Justices Brennan, White, Marshall, and Blackmun, and joined by Justice Powell, the Court in *Bakke* recognized that race can be a factor in university admissions policies.¹⁸⁴ The Court expressed that "[g]overnment may take race into account when it acts . . . to remedy disadvantages cast on minorities by past racial prejudice."¹⁸⁵ Since the issue in *Bakke* was in the context of higher education, this opinion especially supports the conclusion that race may be used in university diversity policies when the classification seeks to remedy the present effects of past discrimination.

B. The Eleventh Circuit's Treatment of Race as a Factor in UGA's Admissions Policy

The Eleventh Circuit focused this part of its opinion on the notion that to serve the goals of diversity, an admissions policy that takes race

districts.

181. *Loving*, 388 U.S. at 12, 87 S.Ct. at 1823.

182. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 722 (1989).

183. *Id.*, 109 S.Ct. at 722.

184. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978).

185. *Id.* at 325, 98 S.Ct. at 2766.

into account must not assess each applicant as a member of a particular racial group but rather as an individual.¹⁸⁶ That is, the university must use race in as limited a manner as possible.¹⁸⁷ The court assumes that race “may be one component of a diverse student body, [but] it is not the only component.”¹⁸⁸ However, the court does not follow the opinion implied in *Croson* and *Bakke* that race may be used as a factor in diversity programs but only to remedy the present effects of past discrimination.

The *Johnson* court considered several factors¹⁸⁹ to determine when race may be used to further the goal of diversity. First, the court states that an admissions policy may consider race if it does so with sufficient flexibility.¹⁹⁰ That is, the use of race must not be subject to rigid or mechanical application in that it favors an applicant’s racial group as a deciding factor in the applicant’s candidacy for admission. It also must see that each applicant is weighed as an individual and not weighed on account of race. The court states as an example, “a university may not establish a quota system for members of certain racial groups, and may not put members of one racial group on a different and more lenient track [towards admission] than members of another group.”¹⁹¹ UGA’s process of awarding the point bonus of 0.5 to minorities during the admissions selection process was a “rigid, mechanical approach to considering race.”¹⁹² Therefore, the point bonus indicated extreme inflexibility in UGA’s policy.

Second, the Eleventh Circuit found that race may be considered if the policy shows that race-neutral factors, which also contribute to diversity, are fully and fairly considered along with race.¹⁹³ The court emphasized that the consideration of race in diversity was not the only, or best, criteria for determining those aspects of an applicant which seek to enhance overall student body diversity.¹⁹⁴ Indeed, race is not the “hallmark of a diverse student body.”¹⁹⁵ The court noted certain aspects of one’s lifestyle or life experiences as examples of race-neutral factors that would enhance student diversity. UGA failed to consider applicants who came from economically disadvantaged

186. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1253-54 (11th Cir. 2001).

187. *Id.* at 1253.

188. *Id.*

189. *Id.* See also *supra* Part II(B) regarding the discussion of the *Paradise* factors used in the *Johnson* court’s analysis.

190. *Johnson*, 263 F.3d at 1253.

191. *Id.*

192. *Id.* at 1255.

193. *Id.* at 1254.

194. *Id.*

195. *Id.*

homes, applicants who have lived or traveled abroad, applicants from rural areas, applicants who speak foreign languages, and applicants who have overcome personal or social hardship.¹⁹⁶ Since UGA's policy excluded several race-neutral factors that would have enhanced diversity in its student body, the court found the policy deficient and incompatible with the need for the policy's flexibility.¹⁹⁷

Third, the Eleventh Circuit determined that a policy must use race in a manner that does not provide an arbitrary benefit to applicants from favored racial groups to justify using race at all in its selection process.¹⁹⁸ The court found that UGA's policy was "wholly, and concededly, arbitrary" in its use of the point bonus it awards to minority applicants.¹⁹⁹ The court referred to this practice as a substitute for assessing the applicant individually and found that the university arbitrarily picked the 0.5 figure when determining how much weight race should carry in the admissions process.²⁰⁰ Recognizing the complexities in placing a value on a racial classification, the *Johnson* court still found the policy to be rigid and incomplete.²⁰¹

Fourth, and last, the court found that a policy that seeks to use race as a diversity factor in its selection process must demonstrate that the university has considered, and subsequently rejected, all race-neutral alternatives for devising student diversity.²⁰² It noted that race may be used only as a last resort because "[r]ace-based decision-making is at odds with the Constitution in any context."²⁰³ The court found that UGA failed to show it considered any alternatives to its present policy.²⁰⁴ These alternatives are "[r]ecruiting, advertising, financial incentives to admittees from less advantaged homes, and other outreach strategies."²⁰⁵ In fact, UGA has been, and remains, committed to explicitly using race in its admissions policy.²⁰⁶ The court found an indication that UGA considered ways to increase its enrollment of African-American students, but no evidence that UGA sought to consider race-neutral means in its effort to enhance diversity.²⁰⁷ Therefore, because UGA made no good faith consideration of race-neutral alternatives to enhancing diversity other

196. *Id.* at 1255.

197. *Johnson*, 263 F.3d at 1255.

198. *Id.* at 1253.

199. *Id.* at 1257.

200. *Id.*

201. *Id.*

202. *Johnson*, at 1253.

203. *Id.* at 1254.

204. *Id.* at 1259.

205. *Id.*

206. *Id.*

207. *Id.*

than benefitting African American applicants with a mechanical point bonus, the court found no justification with the policy's arbitrary use of race in its admissions process.

Under these factors, the *Johnson* court concluded that UGA's freshman admissions policy was not narrowly tailored to produce a diverse student body.²⁰⁸ However, the court did not follow the suggestion in *Bakke* that race may only be used when a showing of the need to remedy the effects of past discrimination exists. Rather, the court employed factors used in *Paradise*, a case in the employment affirmative action context. The Eleventh Circuit should have limited its analysis to whether UGA demonstrated the need to remedy the effects of some past discrimination. Then, the court would not have had to wander into its lengthy discussion of whether UGA's policy was narrowly tailored. Rather, it could have found the policy did not satisfy the narrowly tailored analysis by only determining if UGA identified some past discrimination on its part. In not observing whether a need to remedy the effects of past discrimination existed, the Eleventh Circuit exhausts itself in its analysis and confuses further future courts' decisions on whether race may be used as a factor in university diversity policies.

V. A CALL FOR HELP: SHOULD THE ELEVENTH CIRCUIT HAVE DECIDED THE DIVERSITY ISSUE?

Judge Marcus's opinion for the Eleventh Circuit began with the court's brief treatment of the diversity issue. Specifically, the court stated its "initial question, [], is when, if ever, may student body diversity be a compelling interest?"²⁰⁹ Immediately upon asking this question, the court stated "[w]e need not, and do not, resolve in this opinion whether student body diversity ever may be a compelling interest supporting a university's consideration of race in its admissions process."²¹⁰ The court instead chose to decide if the university's admissions policy is unconstitutional based on whether the program was narrowly tailored to achieve any compelling end. Preliminarily, the court noted "there is no reason . . . to decide whether or when student body diversity may be a compelling interest" because even assuming diversity is a compelling interest, UGA's admissions policy is not narrowly tailored to serve that interest.²¹¹ Thus, the court avoided the most pivotal issue presented. However, the Eleventh Circuit is not the only court to take this position.

208. *Johnson*, 263 F.3d at 1260.

209. *Id.* at 1244.

210. *Id.*

211. *Id.*

Indeed, "legal history demonstrates that the 'assumption dodge' has been invoked by other courts."²¹²

Even though the Eleventh Circuit refused to decide whether diversity is a compelling interest, it, nevertheless, assumed diversity is compelling and analyzed the issue in an attempt to justify its conclusion that UGA's freshman admissions policy is not narrowly tailored to the university's end. The court began this part of its opinion with an examination of Justice Powell's opinion in *Bakke*.²¹³ It noted that "Justice Powell, writing solely for himself, . . . found the university's goal of 'attain[ing] a diverse student body' to be 'clearly' a 'constitutionally permissible goal for an institution of higher education.'"²¹⁴ The court went further to say, however, that no other Justice expressly endorsed that view.²¹⁵ The court also discussed Justice Brennan's opinion which did not consider whether student body diversity constituted a compelling interest sufficient to justify the university's discriminatory admissions policy. The court concluded that it "shall [simply] assume for purposes of this opinion only that UGA's asserted interest in student body diversity is a compelling interest."²¹⁶ Since "courts elsewhere have simply assumed that student body diversity is a compelling interest,"²¹⁷ the court chose to leave the question unanswered.

However, the district court specifically stated that "the Court has no business traveling on assumptions, but rather must face the threshold issue, [diversity], head-on."²¹⁸ Further, the district court suggested that "the 'assumption' dodge . . . has . . . encouraged in the affirmative action realm, encouraged nothing but endless rounds of costly and divisive litigation. That cycle stops here."²¹⁹

Should the Eleventh Circuit have followed the decision-making skills of the district court? In other words, should the Eleventh Circuit

212. *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1374. These decisions include *Tuttle v. Arlington County Sch. Bd.* 195 F.3d 698 (4th Cir. 1999), *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.2d 123 (4th Cir. 1999), *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998), and *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001).

213. 438 U.S. 265, 98 S.Ct. 2733 (1978). *Bakke* was a mixed opinion in which "the Justices . . . agreed to disagree." *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1248 (11th Cir. 2001) (citing *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980) *on reh'g en banc*, 664 F.2d 435 (1981)).

214. *Johnson*, 263 F.3d 1234, 1246 (citing *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-12, 98 S.Ct. 2733, 2759 (1978)).

215. *Id.*

216. *Id.* at 1251.

217. *Id.*

218. *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1374 (S.D. Ga., 2000).

219. *Id.* at 1374-75.

have concluded that diversity is not a compelling interest? The Supreme Court has frequently asserted that it will only decide constitutional questions when it is necessary to the disposition of a certain case.²²⁰ This assertion represents a deep rooted tenet of constitutional adjudication.²²¹ The Eleventh Circuit chose not to decide the diversity issue because it could strike down UGA's admissions policy based on the narrowly tailored analysis. Thus, the court acted as it should. It avoided passing on a constitutional issue by deciding *Johnson* on other grounds.

Even though the Eleventh Circuit followed traditional constitutional tenet, *Johnson* reinforced the problems that face courts and universities when it followed the First and Fourth Circuits's decisions to leave the diversity issue unanswered. By invoking the assumption dodge, the Eleventh Circuit joins the ranks of other "assumers" whose determinations have led affirmative action in universities to a higher level of dispute. But one court cannot solve this controversy. Implicit in the "assumers'" decisions is the sound choice to avoid unnecessary constitutional issues. If a court can decide a case based on other than constitutional grounds, it will most likely do so as did the Eleventh Circuit. The decisions of *Hopwood*, *Smith*, and even the *Johnson* district court are among the minority of cases that have provided an answer to the diversity issue. Indeed, the Supreme Court will have the final word. It must provide a resolution. However, until the Supreme Court decides to put an end to the diversity issue, other courts will suffer the same fate as the Eleventh Circuit in *Johnson*. *Johnson* stands as a plea to the Supreme Court for resolution of the diversity issue.

CONCLUSION

The Eleventh Circuit's analysis of the diversity issue in *Johnson* may be right on track. When faced with whether diversity constitutes a compelling governmental interest that will survive strict scrutiny review, the court plainly assumes so for its purposes and decides the case by the narrowly tailored analysis. Consequently, the court reinforces the chaos that already exists in the area of affirmative action in higher education. This is particularly troubling because

220. *Sweatt v. Painter*, 339 U.S. 629, 631, 70 S.Ct. 848, 849 (1950).

221. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 411, 98 S.Ct. 2733, 2809-10 (1978). Justices Stevens, Burger, Stewart, and Rehnquist stated in their opinion, "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Bakke*, 438 U.S. at 411, 98 S.Ct. at 2809-10 (citing *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154 (1944) (footnote omitted)).

universities and law schools are affected the most. However, the Eleventh Circuit had no choice. *Johnson* could be decided without resorting to constitutional adjudication. Therefore, while providing no answer, *Johnson* only contributed to resolution of the diversity issue by taking its place in line as an "assumer" in what courts and universities hope is the last call for help to the Supreme Court.

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